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NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS VERGARA-REYES,

Defendant - Appellant.

No. 02-50527

D.C. No. CR 02-0412 R

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted April 9, 2003
Pasadena, California

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

Appellant Carlos Vergara-Reyes (“Vergara”) appeals the district court’s denial of a four-level reduction of his offense level for being a minimal participant under U.S.S.G. § 3B1.2(a), and its application of a three-level enhancement under

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

§ 2L1.1(b)(2)(A). Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

The district court did not clearly err in denying the four-level reduction under § 3B1.2(a). Vergara did not prove that he was “substantially” less culpable than his co-participants. United States v. Johnson, 297 F.3d 845, 874 (9th Cir. 2002), cert. denied, 123 S.Ct. 1376 (2003). Therefore, the district court properly applied only a two-level reduction for being a minor participant under U.S.S.G. § 3B1.2(b).

Nor did the district court clearly err in applying a three-level enhancement under § 2L1.1(b)(2)(A) for harboring six or more aliens. Vergara admitted participating in the harboring of five aliens. In addition to those five aliens, a sixth alien, Mark Govea-Nava (“Govea”), was harbored by the conspiracy. Under the Sentencing Guidelines, Vergara could be sentenced based on “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” U.S.S.G. § 1B1.3(a)(1)(B). Here, according to the stipulated facts in the plea agreement, the jointly undertaken criminal activity was a “conspiracy to conceal, harbor, or shield aliens in any place.” The sheltering of Govea furthered this jointly undertaken criminal activity. Therefore, the district court did not err in attributing the harboring of Govea to Vergara for sentencing

purposes, and it did not err in applying the enhancement under U.S.S.G. §
2L1.1(b)(2)(A).

Vergara's sentence is

AFFIRMED.